No. 15-274

In the
Supreme Court of the United States

Whole Woman's Health et al., *Petitioners*

v.

Kirk Cole, Commissioner of the Texas Department of State Health Services, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief of Amicus Curiae National Right to Life Committee Supporting Respondents

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Interest of Amicus Curiae[1]

Founded in 1968, the National Right to Life Committee, Inc. ("NRLC") is the nation's oldest and largest pro-life organization. NRLC is the federation of 50 state right-to-life affiliates and more than 3,000 local chapters. Through education and legislation, NRLC is working to restore legal protection to the most defenseless members of our society who are threatened by abortion, infanticide, assisted suicide, and euthanasia. NRLC and its related entities also have a long history of working to protect maternal health. *See, e.g.*, www.nrlc.org/uploads/international/MCCLMaternalMort2012.pdf.[2]

Summary of the Argument

After *Roe v. Wade*, 410 U.S. 113 (1973), this Court slid into a period of extreme hostility to regulation of abortion as a medical procedure, from which it began recovery in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The Court did

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[1] **Rule 37:6:** Amicus discloses that (1) no counsel for a party authored this brief in whole or in part; (2) no such counsel or a party made any monetary contribution to fund the preparation or submission of this brief; and (3) no person, other than amicus or its counsel, made such a monetary contribution. **Rule 37.3(a):** Petitioners and respondents consented to the filing of this brief, and communications so indicating were provided to the Clerk.

[2] Counsel for Amicus have authored numerous briefs on abortion issues in this and other courts. Mr. Bopp is NRLC's General Counsel. Counsel developed some of the themes herein further in James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (1989).

so by returning to an undue-burden analysis along lines advocated by Justice O'Connor in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452-53 (1983) (O'Connor, J., dissenting, joined by White & Rehnquist, JJ.).

Petitioners seek to return this Court to what it rejected in *Casey*—"the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Casey*, 505 U.S. at 163-64 (citation and quotation marks omitted). Amicus relates this medical-board history in three parts and concludes by explaining that the Fifth Circuit's analysis fits with this Court's rejection of that role in *Casey*.

(I) Initially, *Roe* disavowed on-demand abortion and said states could regulate medical aspects of abortion. Consistent with this, a district court upheld a requirement that second-trimester abortions be performed in a hospital, and this Court affirmed. *Gary-Northwest Indiana Women's Services v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd sub nom. Gary-Northwest Ind. Women's Services v. Orr*, 451 U.S. 934 (1981). But then the Court refused to follow these aspects of *Roe* in *Akron*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *Thornburgh* was so extreme that Chief Justice Burger switched sides and called for reconsideration of *Roe*, noting that *Roe* had disallowed abortion on demand and allowed state medical regulation but that *Thornburgh* abandoned *Roe* and him. *Id.* at 472-83.

(II) In her *Akron* dissent, Justice O'Connor called for a more reasonable approach allowing state regulation of the medical practice of abortion under a threshold undue-burden test designed to keep the Court from

acting as "Platonic Guardians," 462 U.S. at 452-53. In *Thornburgh*, she reiterated her *Akron* argument and decried that the Court had become an "ad hoc nullification" machine. 476 U.S. at 814.

(III) The *Casey* joint opinion, which Justice O'Connor co-authored, 505 U.S. 833, made the undue-burden test the *sole* test for constitutionality in abortion jurisprudence. With greater respect for legislative judgments, lowered scrutiny, and recognition of state interests throughout pregnancy, the Court's new test was designed to extricate it from the role of national "medical board." *Casey*, 505 U.S. at 163-64. This was followed in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), and *Gonzales v. Carhart*, 550 U.S. 124 (2007).

(IV) Petitioners seek to return this Court to the medical-board role that *Casey* rejected. Petitioners seek a return to the *Akron-Thornburgh* era, when legislatures could not rely on bright-line standards from this Court but must, as Justice O'Connor wrote in *Akron*, "continuously and conscientiously study contemporary medical and scientific literature ... to determine whether the effect of a particular regulation is to 'depart from accepted medical practice.'" 462 U.S. at 456. The Fifth Circuit's understanding of *Casey*'s test follows the direction begun in Justice O'Connor's *Akron* dissent, adopted in *Casey*, and followed in *Mazurek* and *Gonzales*. And this Court can provide further guidance by reaffirming that the undue-burden test is roughly analogous to that in *Employment Division v. Smith*, 494 U.S. 872 (1990).

Argument

Though *Roe*, 410 U.S. 113, rejected abortion on demand and said states could regulate the medical aspects of abortion, the Court then slid into an extreme anti-regulation period marked by hyper scrutiny. (*See* Part I.) In her *Akron* dissent, Justice O'Connor rejected such an approach and pointed the Court to its earlier undue-burden analysis. 462 U.S. at 452-53. (*See* Part II.) In *Casey*, 505 U.S. 833, this Court adopted an undue-burden analysis, launching its recovery from the medical-board role, an approach followed in *Mazurek*, 520 U.S. 968, and *Gonzales*, 550 U.S. 124. (*See* Part III.) By pushing for a return to stricter scrutiny, Petitioners here want this Court to resume the medical-board role. This should be rejected. (*See* Part IV.)

I.

From *Roe* to *Thornburgh*, this Court Became the National "Medical Board."

The medical-board approach of *Roe*, 410 U.S. 113, was early criticized. Archibald Cox said it read like "hospital rules" that would be subject to change:

> My criticism of *Roe* ... is that the Court failed to establish the legitimacy of the decision by articulating a precept of sufficient abstraction to lift the ruling above the level of a political judgment .... The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus .... Constitutional rights ought not to be created

> ... unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over time.

Archibald Cox, *The Role of the Supreme Court in American Government* 113-14 (1976).

Cox was prescient, but *Roe* at least rejected abortion on demand, recognized compelling interests in fetal life and maternal health, and held that when the maternal-health interest engages (second trimester),

> a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

410 U.S. at 163. So the *Roe* rule was that the health interest justifies laws reasonably related to protecting health, and the list of "[e]xamples" that *do* reasonably relate to protecting health (i.e., are "permissible") include regulating abortion providers (e.g., requiring hospital privileges) and facilities (e.g., requiring ambulatory-surgical-clinic ("ASC") quality). Since *Casey* recognized a health interest *throughout* pregnancy, 505 U.S. at 878, the challenged provisions here are permissible under *Roe* for abortions at *all* stages.

Taking this Court at its word in *Roe*, a three-judge court upheld a post-first-trimester-hospitalization re-

quirement. *Gary-Northwest*, 496 F. Supp. 894. The abortion providers argued that D&E (dilation and evacuation) procedures had so improved that for the first half of the second trimester a hospitalization requirement was not reasonably related to the health interest. *Id.* at 897. The court rejected the argument as contrary to *Roe*'s express language (quoted above) about what is permissible, *id.* at 898-89, and contrary to *Roe*'s bright-line rule that trimesters be treated as units and not subdivided, *id.* 889-90. It rejected the argument that "*Roe* allow[ed] regulation not of second trimester abortions, but only of abortions more dangerous than childbirth," *id.* at 900, because absent such bright lines "states will be hard-pressed to pursue their legitimate, compelling, interests in protecting maternal health," *id.* The court reiterated the need for bright lines to allow states to legislate and reduce litigation:

> It would be impractical for the constitutionality of a second trimester regulation to depend on a factual question, such as whether the regulation in fact reduced maternal morbidity and mortality. [This] would require relitigation of the regulation's constitutionality with each change in the availability of abortion, with each improvement in abortion technique, and with each publication of statistics showing that abortion skills have improved. Such an interpretation of *Roe* would result in repeated relitigation of the constitutionality of the same statute. It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation.

Id. at 901. The court said the "ultimate test" was "whether the legislature acted reasonably in determining that the regulation would promote maternal

health." *Id.* at 902. And it rejected the test of "whether the statute has the statistically demonstrable result of decreasing maternal morbidity or mortality for specific groups of abortions." *Id.*

This Court summarily affirmed, 451 U.S. 934, which was widely viewed as permitting the hospitalization requirement and endorsing the need for bright lines, reduced litigation, and keeping the federal judiciary out of the medical-board role.

But *Akron*, 462 U.S. 416, changed all that. The *Akron* lower courts had upheld a post-first-trimester-hospitalization requirement by applying precedent. *Id.* at 426. This Court reversed because the American Public Health Association ("APHA"), in 1981, and American College of Obstetricians and Gynecologists ("ACOG"), in 1982, said hospitalization for all post-first-trimester abortions was no longer required. *Id.* at 437.[3] So this Court abandoned the bright-line approach and precedent, saying government may not "depart from accepted medical practice." *Id.* at 434 (citations omitted).

Thornburgh, 476 U.S. 747, was the high-water mark of the abortion-distortion effect, whereby ordinary rules of law were abandoned whenever abortion was at issue, all in the direction of abortion on demand. Dissenting Justice O'Connor decried the fact that the Court had become an "ad hoc nullification" machine. *Id.* at 814. And Chief Justice Burger switched sides and called for *Roe*'s reconsideration, noting that *Roe* had rejected on-demand abortion and allowed state medical regulation but that *Thornburgh* abandoned that and him. *Id.* at 472-83.

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[3] *Akron* also struck, inter alia, requirements for a *physician* to conduct the informed-consent dialogue, *id.* at 449, and for a 24-hour waiting period thereafter, *id.* at 451.

The Chief Justice's further remarks in *Thornburgh* summarize the Court's full embrace of the medical-board role, with extreme deference to elite medical professionals at the expense of legislatures relying on precedents to assert their compelling interests. First, noting that *Roe* established a compelling interest in protecting maternal health, he said: "Yet today the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure...." *Id.* at 783. Second, noting that *Roe* recognized a compelling interest in protecting viable fetal life, he declared that the Court's willingness to strike a second-physician requirement (to care for a born-alive child) made *Roe* "mere shallow rhetoric." *Id.* at 784. "Undoubtedly," he said, "the Pennsylvania Legislature added the ... requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the 'compelling interest' of the states...." *Id.*

The foregoing sketch of the medical-board approach to abortion jurisprudence confirms the early critique that *Roe* was a "Lochnering" decision that threatened rule-of-law principles. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); *see also* Ely, *Democracy and Distrust* (1980) (same critique). In *Lochner v. New York*, 198 U.S. 45 (1905), this Court used substantive due process to strike state limits on bakers' work hours, based on the idea that "liberty" included a right to contract unfettered by government regulation.[4] *Lochner* was based on

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[4] The Lochnering approach was strongly criticized and once abandoned: The Lochnering doctrine, "that due process authorizes courts to hold laws unconstitutional when they

the notion that business could be trusted to do what is best and a belief in equal bargaining power between business and labor. *Roe* and its progeny relied on a trust that doctors will do what is best and a model of the doctor-patient relationship that assumed an identify of interests. Of course this model of the abortionist-patient was unrealistic at the time of *Roe*, *see, e.g.*, Bernard Nathanson, *Deeper Into Abortion*, 291 N. Eng. J. Med. 1189 (1974), and has become increasingly so as further evidence emerges of poor conditions in many clinics and of abortionists with low standards. *See, e.g.*, Jon Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, N.Y. Times (May 13, 2013), http://www.nytimes.com/2013/05/14/us/kermit-gosnell-abortion-doctor-found-guilty-of-murder.html. As Justice O'Connor noted in *Akron*, "the record ... shows that the [doctor-patient] relationship is nonexistent." 462 U.S. at 473. By changing course in *Casey*, this Court recognized that doctors don't always know and do the best and legislatures have the constitutional authority to regulate abortion in furtherance of vital health and life interests without this Court acting as the national medical board to constantly substitute its judgment for those constitutionally appointed legislatures. *See* Part III.

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believe the legislature has acted unwisely, [had] been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id. See also Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 533-37 (1949). The Lochnering rejection clearly reached "social" matters. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 484-86 (1961).

II.

In *Akron*, Justice O'Connor Rejected "Platonic Guardians" and Urged Lower Scrutiny.

Because Justice O'Connor coauthored the *Casey* joint opinion that largely adopted her *Akron*-dissent analysis, examining her *Akron* analysis is vital to interpreting *Casey*. In *Akron*, she attacked the medical-board approach several ways.

First, she rejected the idea of this Court as "Platonic Guardians" who may substitute their judgment for legislators':

> Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"

462 U.S. at 453 (citation omitted). So Lochnering is out, including the "medical board" role. *Id.* at 456.

Second, she noted that the Constitution makes legislatures "the appropriate forum for resolution" of difficult issues, requiring "careful attention" to them:

> In determining whether the State imposes an "undue burden," we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, "the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" This does not mean that in determining whether a regulation imposes an

> "undue burden" on the *Roe* right that we defer to the judgments made by state legislatures. "The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem."

Id. at 465 (citations omitted). "'[R]espect ... properly should be accorded legislative judgments.'" *Id.* at 463 (citation omitted).[5] So legislatures should make the laws, and their choices deserve respect.

Third, Justice O'Connor said the medical-board approach of government interests depending on factually variable points is "completely unworkable." 462 U.S. at 454. "Rather, these interests are present *throughout* pregnancy." *Id.* at 459 (emphasis in original). And the health interest "justifies ... regulation to ensure that first-trimester abortions are performed as safely as possible." *Id.* at 460.[6] So constitutional analysis should not turn on moveable factual lines, and state interests are always compelling and justify making even first-tri-

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[5] Justice O'Connor added this about the abilities of legislatures versus courts, *id.* at 456:

> It is ... difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time ... [ACOG] ... revises its views about what is and what is not appropriate medical procedure in this area.

[6] This simply restates *Roe*'s extant holding that states may regulate abortionists and abortion facilities to "insure maximum safety for the patient." 410 U.S. at 150.

mester abortions "as safe[] as possible."

Fourth, Justice O'Connor said this Court's jurisprudence has a "required threshold inquiry"—the "'unduly burdensome' standard." *Id.* at 453. "[N]ot every regulation ... must be measured against the State's compelling interests and examined with strict scrutiny." *Id.* at 461. "[T]his 'unduly burdensome' standard should be applied ... throughout the entire pregnancy" and absent such a burden the only question is whether a "regulation rationally relates to a legitimate state purpose." *Id.* at 453 (citation omitted). So the undue-burden/rational-relationship test was a threshold test under which the sort of regulations at issue in *Akron* would be upheld (as would the sort of regulations that *Roe* held *are* rationally related to maternal-health protection as a matter of law, *see supra* at 5).

Fifth, Justice O'Connor said "an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision." *Id.* at 464. Importantly, she equated "undue burden" with the *Akron* majority's use of "significant obstacle," *id.* at 463, thereby equating the term "significant obstacle" with "absolute obstacles or severe limitations." As an example of such a significant obstacle, she cited the "*complete* prohibition on abortions in certain circumstances" that the majority saw in the earlier *Danforth* decision. *Id.* at 464 (citing *id.* at 429 n.11, citing *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 78-79 (1976)) (emphasis in original).[7] So a

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[7] Justice O'Connor also equated "undue burden" and "significant obstacle" with "'official interference' with the abortion decision and said that "[a] health regulation, such as the hospitalization requirement, simply does not rise to" such a level. *Id.* at 467 (citation omitted),

"significant obstacle" or "undue burden" must rise to the level of an "absolute obstacle[] or severe limitation[]," such as a "complete prohibition," before strict scrutiny would engage, short of which only a readily met rational-relationship test would apply.

Sixth, Justice O'Connor also explained what a significant obstacle/undue burden does *not* entail, just to be clear: "That a state regulation may 'inhibit' abortions to some degree does not require that we find the regulation invalid." *Id.* at 464 (citation omitted). And regulations at issue in *Akron* did not involve significant obstacles/undue burdens, e.g., a post-first-trimester hospitalization requirement, which is rationally related to the health interest, *id.* at 467, or a 24-hour waiting period, which is rationally related to both state interests, *id.* at 472-74. Extra costs, travel days, delay, scheduling difficulties, and the like are not undue burdens. *Id.* at 466-67, 473. And even if they were, the state's compelling interests[8] "clearly justify the waiting period." *Id.* 473-74.[9] "An 'unduly burdensome' standard is particularly appropriate in the abortion context because of the *nature* and *scope* of the right that is involved," which "'cannot be said to be absolute.'" *Id.* at

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[8] Justice O'Connor said "[h]ealth-related factors that may legitimately be considered by the State go well beyond what various medical organizations have to say about the *physical* safety of a particular procedure." *Id.* at 467 (emphasis in original).

[9] In *Simopolous v. Virginia*, 462 U.S. 506 (1983), the Court upheld a post-first trimester ASC requirement under strict scrutiny, and Justice O'Connor would have held it constitutional throughout pregnancy under the threshold undue-burden standard, *id.* at 520 (O'Connor, J., concurring in part and in the judgment).

463 (citation omitted) (emphasis in original). So requiring admitting privileges or ASC standards would not be an undue burden, and even if it were the state's compelling interest would justify it under Justice O'Connor's analysis.

Seventh, regarding the "reasonably related" test, Justice O'Connor said the "hospitalization requirement 'reasonably relates' to its compelling interest in ... maternal health under any normal understanding of what 'reasonably relates' signifies." *Id.* at 467 n.11. "The Court has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest." *Id.* Rather, "'[a] State necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'" *Id.* (citation omitted). So as *Roe* held, regulation of abortionists and abortion facilities reasonably relate to the government's health interest. 424 U.S. at 163.

Justice O'Connor reaffirmed her commitment to her *Akron*-dissent analysis in her *Thornburgh* dissent. 476 U.S. at 828. As noted next, Justice O'Connor's views largely prevailed and were incorporated into the *Casey* joint opinion, which she co-authored.

III.

Casey, *Mazurek*, and *Gonzales* Rejected the Medical-Board Role, Using Lower Scrutiny.

In *Casey*, 505 U.S. 833, this Court largely adopted Justice O'Connor's *Akron*-dissent analysis, including greater deference, lower scrutiny, government interests throughout pregnancy, and a significant-obstacle/undue-burden test with the understandings that (i) added costs, travel, delay, scheduling difficulties, and the like are not undue burdens and (ii) regulations of abortion personnel/facilities are rationally related to

governmental interests.[10] The result was the upholding of provisions (e.g., a 24-hour waiting period and the requirement that informed-consent information be communicated by a physician) that would have failed the *Akron-Thornburgh* strict scrutiny. Three analytical points are key to the present analysis.

First, *Casey* adopted Justice O'Connor's significant-

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[10] In *Casey*, NRLC submitted an amicus brief, authored by present counsel and arguing themes that would appear in the *Casey* joint opinion. Amicus argued that "*Roe v. Wade* is unworkable." NRLC Br. at 2 (capitalization altered here and in following quotes). NRLC explained that "*Roe* has worked a distortion on the normal functioning of the law wherever abortion jurisprudence touches the law," *id.* at 7, and demonstrated the abortion-distortion effect in several ways, *id.* at 7-14. NRLC argued that "if the undue burden test is to be used, a workable standard must be clearly articulated." *Id.* at 14. Amicus explained that "the undue burden test is not workable as understood and applied by the Third Circuit, *id.* at 15, showing the flaws, *id.* at 15-18. NRLC argued that "the undue burden test might be workable if this Court sets forth clear standards." *Id.* at 18. As most relevant here, NRLC cited Justice O'Connor's *Akron* dissent for the proposition that "if the regulatory burden is rationally related to a legitimate governmental interest, and its only impact is to inhibit abortions to some degree, even a significant one, the rational basis finding ends the judicial inquiry. *Id.* at 19 (citation and internal quotation marks omitted). NRLC urged the recognition of governmental interest throughout pregnancy. *Id.* at 20-21. Amicus argued that "failure to establish the above ... elements of the undue burden test would result in ad-hoc, multi-factor balancing, yielding unclear guidelines." *Id.* at 21. NRLC urged the Court to establish neutral principles and clear lines to enable legislatures and courts to do their jobs without becoming ad-hoc nullification machines. *Id.* at 21-24.

obstacle/undue-burden test as *the* test for abortion regulations, not just as a threshold test. 505 U.S. at 874-79 (plurality).[11] While Justice O'Connor had shown from precedent, in her *Akron* dissent, that the test was a threshold test, after which an abortion regulation might survive strict scrutiny given compelling interests, *Casey* made it the *only* test: "[A]n undue burden is an unconstitutional burden." *Id.* at 877 (citation omitted).[12] Given this elimination of strict scrutiny, the undue-burden test cannot mean anything approaching

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[11] The undue-burden analysis in *Casey* was set out in Part IV of the joint opinion authored by Justices O'Connor, Kennedy, and Souter, which was not the opinion of the Court. Nonetheless, this Part IV plurality analysis states the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977). For convenience and to preserve words, "plurality" or a similar label will not always be used when referring to the plurality portion of the joint opinion.

[12] This simplest statement of the test shows that trying to read a "purpose" test into the undue-burden test to expand the test beyond this simple statement is erroneous. (*See, e.g.*, Pet. Br. at 35.) The lowered-scrutiny undue-burden test is no warrant for challenges such as this seeking to prove improper purposes where the regulations at issue are so rationally related to the health interest, i.e., their "purpose" is clear. Though Petitioners try to use medical-necessity arguments to prove improper purpose, *Gonzales* did no such analysis in finding that a partial-birth-abortion ban had the "self-evident" purpose (and "reasonable inference") of promoting the life interest. 550 U.S. at 157-60. This Court does not infer improper purpose given "legitimate reasons." *McClesky v Kemp*, 481 U.S. 279, 298-99 (1987). Doing otherwise here would reintroduce the abortion-distortion effect that reached its peak in the *Akron-Thornburgh* period of hyper scrutiny that was rejected in *Casey*.

strict scrutiny, as Petitioners here seek,[13] let alone the hyper scrutiny of the *Akron-Thornburgh* era.[14]

Second, regarding what constitutes an undue burden, *Casey*'s elimination of strict scrutiny could not have *lowered* what constitutes an undue burden (as Justice O'Connor described it in *Akron*) because *Casey* was implementing lower scrutiny (as evidenced by pro-

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[13] "Petitioners do not seek application of strict scrutiny," they claim, because they have not "asked the court to employ a least restrictive means analysis." (Cert. Reply at 6.) Least-restrictive-means is a subset of the "narrowly drawn" analysis that Justice O'Connor said "[t]he Court has never required," *Akron*, 462 U.S. at 467 n.11, but she nonetheless identified the analysis at work in abortion jurisprudence beyond the undue-burden threshold test as "strict scrutiny," *id.* at 461. Petitioners seek a return to strict scrutiny by, inter alia, asking this Court to return to the medical-board role it rejected in *Casey* after the hyper scrutiny of *Thornburgh*, where she said the Court was doing "ad hoc nullification." 476 U.S. at 814.

[14] Having eliminated strict scrutiny, *Casey* did not identify interests as compelling, speaking instead, e.g., of "a substantial interest in potential life," *id.* at 876 (plurality), though that "substantial interest" was sufficiently compelling at viability to justify banning abortion (with a maternal life/health exception), *id.* at 879. Though the *Casey* plurality abandoned *Roe*'s trimester scheme, it did not overrule *Roe*'s holding that life and health interests are compelling at certain points, which is what actually justifies the post-viability ban under substantive-due-process analysis. So at a minimum ASC requirements are constitutional post-first-trimester, as this Court held in *Simopolous* under strict scrutiny, 462 U.S. at 519, due to the compelling health interest. *Casey*'s lower-scrutiny analysis cannot properly be read to be higher scrutiny than that of *Simopolous*.

visions upheld that would have failed before and by subsequent cases applying the new test). Removal of strict scrutiny could not mean that the undue-burden test was to be a new strict-scrutiny test. Rather, making the undue-burden test the only test logically *raised* the bar for what is undue because there is no backup opportunity for a state to prove that regulations designed to protect maternal health are justified by a compelling state interest if the incidental burden might be deemed undue—as Justice O'Connor indicated would be the case regarding a 24-hour waiting period in her *Akron* dissent. 462 U.S. at 473-74. It would be nonsensical to implement an undue-burden line that would have made the hospitalization and waiting-period requirements at issue in *Akron* unconstitutional without the opportunity for justification under strict scrutiny, so the line for what is undue had to be drawn above such hospitalization and waiting-period requirements (with attendant costs, delays, etc. that were not undue). In short, *Casey* created a high bar for what is an undue burden because it was getting out of the medical-board role with a more deferential approach involving lowered scrutiny.

So when *Casey* adopted an "undue burden" test and defined "undue burden [a]s a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," 505 U.S. at 877, it was not inviting the sort of present challenge to requirements—involving hospital-privilege standards for abortionists and ASC standards for abortion facilities—that were clearly constitutional under Justice O'Connor's *Akron* analysis. Nor when Justice O'Connor co-authored *Casey* did her use of "substantial obstacle" in any way lower the bar from the synonymous "signif-

icant obstacle"[15] terminology that she equated in *Akron* with "undue burden," *id.* at 463, and with "absolute obstacles or severe limitations," *id.* at 464, an example of which was the "*complete* prohibition on abortions in certain circumstances," *id.* (emphasis in original). So a "substantial obstacle," just as a "significant obstacle" or "undue burden," must rise to the level of an "absolute obstacle[] or severe limitation[]," such as a "complete prohibition" before it would be unconstitutional.

And this Court has consistently held that extra costs, delays, scheduling difficulties, and the like (including those of the sort at issue here) fall below the undue-burden bar, 505 U.S. at 885-86, as Justice O'Connor said in *Akron*. 462 U.S. at 466-67, 473.

Moreover, the fact that particular women might have more difficulty obtaining an abortion than others, e.g., because of a waiting period, does not create an undue burden because "[a] particular burden is not of necessity a substantial obstacle." *Casey*, 505 U.S. at 887 Rather, *Casey*'s focus in determining what is "undue interference" (yet another synonym for "undue burden"), *id.* at 846, is on something that is "a *prohibition* of abortion or the imposition of a substantial obstacle to the woman's effective *right to elect* the procedure," *id.* (emphasis added). So "undue burden" does not focus on a right to be free of lesser obstacles that do not go to the right to *choose* abortion itself, particularly such less-prohibitive obstacles that are not of the state's making. Put another way, the test is whether an abortion regulation is "designed to strike *at the right itself*"

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[15] Though "significant" and "substantial" are at least synonymous, the change may be another indication of the raised bar for cognizable burdens because a burden may be significant without being substantial.

or in [a] real sense deprive[s] women of the *ultimate decision*," *Id.* at 875, 875 (plurality joint opinion) (emphasis added). Burdens imposed by "a law which serves a valid purpose" and only has "the incidental effect of increasing the cost or decreasing the availability of medical care," *id.* at 874, are not undue as a matter of law.

Third, regarding what non-undue-burdens are rationally related to a governmental interest, *Roe* categorized some "examples" of regulations that were rationally related to a the health interest. 410 U.S. at 163. This was a matter-of-law conclusion, based on the obvious relationship of such regulations of abortion providers and facilities to a health interest, not a factual test designed to suck this Court into the medical-board role to determine whether a particular regulation clearly designed to protect maternal health actually achieves that goal.

Casey followed this matter-of-law analysis in the plurality opinion. 505 U.S. at 881-87 (V.B), 899-01 (V.D-E). Regarding the 24-hour waiting period, the plurality said that "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable" and "[i]n theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn ...." *Id.* at 885. Regarding the parental-consent provision, they said that the provision "may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private ...." *Id.* at 899-00. Regarding the recordkeeping and reporting requirements, they noted that in *Danforth* this Court had held that recordkeeping and reporting provisions 'that are reasonably directed to the preservation of maternal health and that properly

respect a patient's confidentiality and privacy are permissible.'" *Id.* at 900 (citation omitted). They added regarding "all the provisions at issue here," that "they do relate to health." *Id.* "[S]o it cannot be said that the [reporting] requirements serve no purpose other than to make abortions more difficult." *Id.* at 901. The foregoing statements are consistent with the plurality joint opinion's categorical statement that "*[r]egulations designed to foster the health of a woman seeking an abortion* are valid if they do no constitute an undue burden." *Id.* at 878 (emphasis added). In other words, if a regulation is designed to foster health, it is rationally related to the state's health interest. This is all matter-of-law analysis about what is *rational*, not the substitution of a *factfinding* test as Petitioners here propose.

Petitioners would throw out all the foregoing explanation of the *Casey* plurality's analysis on the basis of one word—"[u]nnecessary"—which does not bear the superstructure they would erect on it. (Pet. Br. at 2.) The word occurs in this plurality statement:

> As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

Id. at 878. Petitioners would make "unnecessary" a warrant for a test whereby the state must factually prove necessity under neo-strict scrutiny. (Pet. Br. at 33-53.) But "unnecessary" simply relates to the reasonable-relationship prong of the undue-burden test, i.e., as the opposite of "further[ing] the health or safety of a woman seeking an abortion" in the prior

sentence. As just shown, the rational-relationship test is a matter-of-law test (note the words "reasonabl[e]" and "rational") under which, ever since *Roe*, a medical-regulation law regulating abortion providers and facilities to maximize maternal health *is* rationally related to the state's health interest. "Unnecessary" is shorthand for the opposite of the first phrase in the following categorical statement earlier on the same page: "*Regulations designed to foster the health of a woman seeking an abortion* are valid if they do not constitute an undue burden." *Id.* (emphasis added). So "[u]nnecessary" created no new test, and the reasonable-relationship prong remains a matter-of-law, rational-basis test. And any notion that medical regulations imposing the quality-level requirements that abortionists get admitting privileges and abortion clinics meet ASC standards do not relate to a maternal-health interest as a matter of "reason" or "rationality" is erroneous.

Vitally, *Casey* refused to do what Petitioners want this Court to do here—to require government to prove that the benefits of its regulation outweigh burdens and thus prove a regulation medically necessary or sufficiently beneficial. In contrast, *Casey* upheld the requirement that a *physician* provide informed-consent information, "*even if* an objective assessment might suggest that those same tasks could be performed by others." 505 U.S. at 885 (emphasis added).

That the foregoing explanation of the analysis instituted by *Casey* is correct is borne out by this Court's applications of the *Casey* standard in two subsequent cases. Neither uses *Casey* in the way Petitioners urge.

In *Mazurek*, 520 U.S. 968, this Court applied *Casey*'s analysis to uphold a requirement that abortions be performed by physicians, in the face of a chal-

lenge claiming that the evidence (a study) showed that physician assistants could as safely do some abortions as physicians. Plaintiffs argued that "'all health evidence contradicts the claim that there is any health basis' for the law." *Id.* at 973 (citation omitted). This Court held that argument "squarely foreclosed by *Casey* itself." *Id.* It did not require the state to prove that the physician-only requirement was medically necessary. It did not require facts showing that medical benefits outweighed burdens. It was enough that a physician-only requirement is not undue, and that regulation of the qualifications of those performing abortion is reasonably related (based on rationality, not factual proof) to the maternal-health interest.

In *Gonzales*, this Court applied the *Casey* analysis in the same manner, requiring a "rational basis" and no "undue burden," but not a balancing test to prove necessity or actual medical benefit. 550 U.S. at 158. And this Court once again eschewed the medical-board role, both in words, *id.* at 163-64, and by the above analysis. The existence of "medical uncertainty" as to a medical benefit did not require this court to sit as the national medical board and resolve that issue but instead the uncertainty sufficed to support a finding of no undue burden, *id.* at 164, thereby respecting legislative judgment. And as already noted, *Gonzales* did not search for medical-benefit evidence to determine some impermissible purpose but relied in finding no impermissible purpose on the rational-relationship approach of "self-evident" and "reasonable inference" evidence that a law designed to prevent a procedure widely viewed as infanticide promoted respect for human life that was partially born. *Id.* at 157-60.

IV.

The Court Should Decline the Invitation to Relapse to the National "Medical Board."

As held in *Roe* and reaffirmed in *Casey*, the abortion liberty is not an on-demand right, due to its nature and the interests involved. *See Casey*, 505 U.S. at 869. So it is subject to regulation, especially as to providers and facilities as here.

As sketched in Part I, this Court assumed a medical-board role in the *Akron-Thornburgh* era of hyper scrutiny, substituting its judgment for that of legislatures and striking down reasonable regulations. As shown in Part II, Justice O'Connor urged the Court to abandon that medical-board role by adopting a lower-scrutiny, undue-burden standard. As shown in Part III, this Court in *Casey* abandoned the medical-board role by adopting a lower-scrutiny, undue-burden standard. The Fifth Circuit decision below relied on the actual undue-burden test of *Casey* as Respondents explain.

But Petitioners urge this Court to resume the medical-board role by rejecting the analysis central to *Casey*, *Mazurek*, and *Gonzales*. They want this Court to reinterpret the undue-burden test in a way that abandons the test. They want this Court to second-guess a state legislature for simply requiring (as do other states) that abortion providers and facilities meet reasonable quality standards that are, as a matter of law, rationally related to the state's interest in regulating "to insure maximum safety for the patient," *Roe*, 410 U.S. at 150, including "regulation to ensure that first-trimester abortions are performed as safely as possible," *Akron*, 462 U.S. at 460 (O'Connor, J., dissenting).

The Court should decline Petitioners' invitation to resume the medical-board role for many reasons, but

especially for three—Court concerns, legislative concerns, and quality concerns.

Court concerns. The Court concerns have to do with the role of this Court in the Constitution and the abortion debate. And they have to do with the concerns in *Casey*'s long discussion (Parts I-III) about protecting both the law (by removing doubt and providing stability) and this Court (preserving legitimacy).

When this Court entered the abortion debate in *Roe*, 410 U.S. 113, it was criticized, inter alia, as violating its constitutional role and interfering in the societal resolution of the debate that was being worked out in state legislatures. For example Ely declared that *Roe* was "*not* constitutional law, and [gave] almost no sense of an obligation to try to be." *The Wages of Crying Wolf*, 82 Yale L.J. at 947 (emphasis in original). Alexander Bickel compared *Roe* to a "statute" and said: "The state regulates and licenses restaurants and pool halls and ... God know what else in order to protect the public; why may it not similarly regulate ... abortion clinics, or doctors' offices ...?" *The Morality of Consent* 27 (1975). Given such critiques and the hyper-scrutiny era of *Akron* and *Thornburgh*, it was unsurprising that the federal government repeatedly called for *Roe*'s reversal, as *Casey* noted. 505 U.S. at 844.

The unusual three-Justice joint opinion in *Casey* attempted to settle the "sustained and widespread debate *Roe* has provoked," *id.* at 861, by a strong reaffirmation of *Roe*'s essential holdings, abandonment of the problematic trimester scheme, and implementation of a more deferential, lower-scrutiny undue-burden test designed to get this Court out of the medical-board role that had been the focus of much the critique of *Roe* and its progeny. The Court expressed concerns about "a

jurisprudence of doubt," *id.*, "[a]n obligation to follow precedent," *id.* at 854, not being seen to "surrender to political pressure," *id.* at 867, and not "subverting the Court's legitimacy" by "overrul[ing] under fire," *id.* *Casey* declared: "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through constitutional ideals." *Id.* 868. *Casey* concluded that "[a] decision to overrule *Roe*'s essential holding under the current circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 869.

All of those concerns apply here if this Court were to accept Petitioners' invitation to resume the medical-board role that *Casey* rejected by now rejecting the actual undue-burden test that *Casey* established. Abandoning stare decisis by so abandoning *Casey* would make the extended discussion in *Casey* of the need to reaffirm *Roe* because of stare decisis all ring hollow. It would be more defensible to simply reverse *Roe* in this case if stare decisis is now to be so readily abandoned after such heavy reliance on that doctrine. Adopting Petitioners' erroneous interpretation of the undue-burden test would reject precedent, reintroduce a jurisprudence of doubt, make this Court into Platonic Guardians, and create rule-of-law problems with the ability of legislatures to enact laws, as discussed next.

Legislative concerns. The legislative concerns have to do with (i) respecting the proper role of legislatures in our constitutional scheme; (ii) the rule-of-law need for stability and predictability in the law that legislatures can rely on in asserting governmental interests; and (iii) practicability issues, especially the need for

bright lines so legislators need not monitor the latest pronouncements by ACOG et al. to assure that laws previously upheld and in place elsewhere are not unconstitutional in their state whenever reproductive-rights advocates can come up with new ways to read old words in this Court's opinions.

As Justice O'Connor admonished long ago in her *Akron* dissent, the Constitution provides for no Platonic Guardians, legislatures are the bodies appointed by the Constitution to make laws, legislators are as much the ultimate guardians of liberties and society's welfare as are courts, legislators require latitude in their work, and legislative decisions are entitled to the great respect afforded by the undue-burden test (not the hostile, judgment-substitution approach of hyper scrutiny). *See supra* at 10-11. As a former legislator, Justice O'Connor could understand legislative concerns in ways that others perhaps could not.

All of those concerns apply here if this Court were to reject *Casey*'s accommodation of legislative concerns and relapse to the Platonic-Guardian, medical-board role that Petitioners want to impose on the Court. If Petitioners are allowed to reinterpret *Casey*'s lower-scrutiny, undue-burden standard as a strict-scrutiny (or hyper-scrutiny), fact-driven, balancing test, then predictability and stability in the law are gone, along with bright lines, respect for legislative choice, and the period of minimal abortion litigation that has prevailed since *Casey*. Fueled by attorneys fees wrung fro states simply trying to do what this Court promised they could do in *Casey*, abortion-on-demand advocates will press their newly endorsed strict scrutiny on all fronts, as they did in the past. If the *Casey* line is yielded, this Court will find no other such line—with one side pushing for a full return to the hyper scrutiny

of *Akron* and *Thornburgh* and the other side pushing for the reversal of *Roe* with the new argument that it is now proven that no line short of reversal can bring stability and predictability to the law and make legislation practicable.

Quality concerns. The quality-concerns issue involves the ability of states to do their traditional job of imposing quality controls on medical practice. While high-level constitutional concerns are at issue here, the other, very practical issue is whether a state may, like other states, decide that abortionists and abortion facilities should meet certain quality standards. The fact that the record shows that many do not should give all pause because the requirements are clearly related to protecting maternal health. The fact that many abortionists and abortion facilities do not measure up to standards that many other physicians and facilities meet is a reason to uphold these quality standards, not to strike them.

Of course, as discussed above, legislatures are the bodies appointed and equipped to decide what quality standards are required in medical practice. Courts should not constitute themselves as Platonic Guardians to substitute their judgment. But setting all those high-level arguments aside, this case involves judgments about the quality of medical care. Ruling for Petitioners would say that women seeking abortions need not have physicians with admitting privileges or facilities with ASC standards, though Texas (as have many states) found that doing so would best protect maternal health. *Roe* said that states may "insure maximum safety for the patient," 410 U.S. at 150, and this Court should not abandon that precedent. As Justice O'Connor explained, states may enact "regulation to ensure that first-trimester abortions are performed

as safely as possible," *Akron*, 462 U.S. at 460 (O'Connor, J. dissenting). Texas has done that and should not be second guessed. Rather, abortion providers and facilities should conform to the required quality standards, just as many others have.

A Proposed Clarification. Given this current attempt to replace *Casey*'s undue-burden test, language is needed in this Court's forthcoming opinion to discourage such future litigation by strengthening and clarifying what *Casey* said about the difference between "incidental effect" and "strik[ing] at the right itself." 505 U.S. at 874 (collecting cases).

Abortion-rights advocates have latched onto certain language in *Casey* in their attempt to overturn *Casey*'s actual undue-burden test. The forthcoming opinion should of course hold that their interpretation is erroneous and their neo-strict-scrutiny test may not displace *Casey*'s actual undue-burden test. But in the process, this Court should also clarify and strengthen *Casey*'s incidental-burden language to make clear that future novel readings of precedent will also be rejected.

Casey emphasized that the abortion liberty is not absolute: "As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement on that right," e.g., "not every ballot access limitation amounts to an infringement on the right to vote. *Id.* at 873-74. "The abortion right is similar" in that many regulations "have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure," *id.* at 874, but those do not infringe the abortion right. *Casey* then made the crucial contrast between incidental-effect laws and strike-at-

the-right laws:

> The fact that a law which serves a valid purpose, one not designed to *strike at the right* itself, has the *incidental effect* of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's *ability to make this decision* does the power of the State reach into the heart of the [abortion] liberty ...."

Id. (emphasis added).

Petitioners here want to latch onto the "serves a valid purpose" language to create a new test that is not there. Rather, *Casey* was drawing a contrast between permissible incidental-effect laws and impermissible strike-at-the-right laws.

A "valid purpose" is simply one that is not a strike-at-the-right purpose. And recognizing a valid purpose requires a matter-of-law determination, by reason, not a factual exploration of medical opinion (here disputed) to divine impermissible purpose so a court may substitute its judgment for the state's. An invalid purpose would occur only if a law targets a woman's "ability to make[] this decision" to have an abortion, *id.*, which targeting is absent, as a matter of law, where a law addresses itself to medical-quality requirements for abortion, not the right to *choose* abortion. The incidental burdens of such medical-quality requirements on *effectuating* the right is not a cognizable *targeting* of the right itself.

A rough analogy may be seen in *Smith*, 494 U.S. 872, in which this Court held that generally applicable laws (there one barring illegal-drug use) are subject to rational-basis scrutiny even though the fundamental

religious-free-exercise right is at issue. Of course, as four members of this Court demonstrated in *Casey*, 505 U.S. at 987-88 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., concurring in the judgment in part and dissenting in part), the analogy is not entirely apt. Nonetheless, they agreed that the incidental-effect and strike-at-the-right language of the controlling joint opinion was intended to be a test like *Smith* even though "Pennsylvania ha[d] *consciously and directly* regulated" abortion. *Id.* (emphasis in original).

So *Casey*'s undue-burden test is a *Smith*-stye test in the sense that a rational-basis test applies to most regulation, including the ordinary medical-quality regulations at issue here. The undue-burden test goes beyond *Smith* in that the undue-burden test is a rational-basis test not only as to neutral laws of general applicability but also as to laws that consciously and directly regulate abortionists and abortion facilities. So the forthcoming opinion should make clear that *Casey*'s undue-burden test is a *Smith*-style test so modified and strengthened. It should affirm that where abortion practice is regulated in the ordinary ways that legislatures regulate medical practice, e.g., by imposing quality standards to maximize maternal health, the deferential rational-basis test applies. Only if a regulation seeks to prevent women from *choosing* abortion, not just where it burdens *effectuating* that choice, would the rational-basis test not apply. And this Court should note that gone are the days of the abortion-distortion effect whereby legislatures could impose ordinary medical regulations, such as ASC requirements, on other sorts of ambulatory surgical facilities but not abortion clinics doing ambulatory surgical procedures.

Conclusion

Abortion-rights advocates seek to turn back time to before *Casey*. They seek the approach of *Akron* and *Thornburgh* that yielded the abortion-distortion effect and "ad hoc nullification" of state efforts to assert supposedly compelling interest. *Thornburgh*, 476 U.S. at 814 (O'Connor, J. dissenting). They seek to overturn *Casey*'s undue-burden test with new and creative reimaginings of what *Casey* held. And they seek to reconstitute this Court as Platonic Guardians substituting their preferences for those of legislatures constitutionally appointed to make the laws.

This Court declined the medical-board role, along with strict scrutiny, in *Casey*. It should decline the invitation to resume that role for the same reasons it did so in *Casey*. And it should clarify that the undue-burden test is a modified *Smith*-style test whereby future challenges such as this will be subject to deferential rational-basis review and quickly rejected.

Respectfully submitted,

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